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In re Application of
McMillen, et al.
Application No. 10/663,194
Filed: February 9, 2004
Attorney Docket No. 41575-208
For: AUTOMATICALLY ACTUATING
ERGONOMIC SUPPORT FOR A FOLD
DOWN SEAT

OFFICE OF PETITIONS

DECISION GRANTING
PETITION

This is a decision on the petition, filed February 22, 2005, requesting that the above-identified application be accorded a filing date of September 16, 2003, instead of the presently accorded filing date of February 9, 2004. The petition will be treated under 37 CFR 1.182

The petition under 37 CFR 1.182 is **GRANTED**.

The application was filed on September 16, 2003. On December 9, 2003, the Office of Initial Patent Examination mailed a Notice to File Missing Parts of Nonprovisional Application ("Notice") stating that the application had been accorded a filing date of September 16, 2003 and informing petitioners, *inter alia*, that Figure 18 appeared to have been omitted.

On February 9, 2004, petitioners filed replacement drawings that included one labeled Figure 18. Petitioners stated that Figure 17 and 18 are identical illustrations except for numeral references and associated lead lines.

The Office processed these drawings and assigned a February 9, 2004 filing date the application.

On September 10, 2004, petitioners filed a paper entitled, "AMENDMENT AND REQUEST FOR CORRECTED FILING RECEIPT," stating that due to clerical error, applicants mistakenly submitted two formal versions of Figure 17 on February 9, 2004. The version labeled "Figure 17" was an improperly-rendered formal version of the figure. The drawing labeled "Figure 18" was the most accurate substitution for originally filed informal Figure 17. Applicants submitted an amendment eliminating references to Figure 18 and replacement drawings of Figures 1-17.

A formal request for corrected filing receipt, filed January 19, 2005 was dismissed on February 3, 2005 because a petition was required.

Petitioner filed the instant petition on February 22, 2005, requesting yet again that the Office reinstate the September 16, 2003 filing date for the above-identified application.

The mailing of a Notice regarding omitted items permits an applicant to either: (1) promptly establish prior receipt in the PTO of the items at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted items in a nonprovisional application and accept the date of such submission as the application filing date. An applicant asserting that the missing items were in fact deposited in the PTO with the application papers must file a petition (and the appropriate petition fee) with evidence of such deposit. An applicant desiring to submit the omitted items in a nonprovisional application and accept the date of such submission as the application filing date must file any omitted items with an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such items and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the Notice (37 CFR 1.181(f)). Failure to select option (1) or (2) above is considered a constructive acceptance of the application as filed.

In the instant case, petitioner did not select option (1) or (2). Instead, on February 9, 2004, petitioners submitted Figure 18 and argued that Figure 17 and 18 are virtually identical. However, new matter is not the issue. Either the drawing of Figure 18 was present upon the filing of the application, or it was not. Petitioners did not prove a drawing labeled "Figure 18" was filed on September 16, 2003. Therefore, the application could not be processed with a filing date of September 16, 2003 with Figure 18 as part of the original application papers. The Office properly changed the application's filing date to February 9, 2004.

Petitioners retreated from their earlier position and cancelled Figure 18 and amended the specification to eliminate references to Figure 18 on September 10, 2004. Petitioners, in essence, accepted the application as filed.

Therefore, the petition to reinstate a filing date of September 16, 2003 to the application is **GRANTED**.

The application is being returned to Office of Initial Patent Examination for further processing with a filing date of **September 16, 2003** and the mailing of a corrected filing receipt. Thereafter, the application will be forwarded to Technology Center 3600 for examination in due course.

Any inquiries pertaining to this matter may be directed to the undersigned at (571) 272-3230.

E Shirene Willis

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